No. 10-236

IN THE

Supreme Court of the United States

GREGG C. REVELL,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

KATHLEEN GILL MILLER
Counsel of Record
OFFICE OF JAMES M. BEGLEY
THE PORT AUTHORITY OF NY & NJ
225 Park Avenue South
13th Floor
New York, NY 10003
(212) 435-3434
kmiller@panynj.gov

Attorney for Respondents

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SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit ("Third Circuit") correctly affirmed the district court's granting summary judgment dismissing petitioner Gregg Revell's ("Revell") claim pursuant to 42 U.S.C. § 1983 that his Fourth Amendment rights as secured by the Fourteenth Amendment were violated by his arrest on April 6, 2005 at Newark Liberty International Airport ("Newark") for unlawful possession of a firearm and hollow-point bullets, because Revell did not fall under the protection of 18 U.S.C. § 926A, known as the Firearm Owners Protection Act ("FOPA"). This statute permits persons to travel between places where they lawfully possess a firearm through a jurisdiction where they might not lawfully possess it, provided they comply with certain conditions set forth in the statute. A key condition is that during transport, the firearm and ammunition are not "readily accessible" to the person traveling with them. Revell failed to comply with this condition when through a series of mishaps, he missed his airline connection and retrieved the gun and ammunition, which he then took to a hotel overnight before returning to the airport.

There was probable cause for his arrest when he arrived at the airport the next day to resume his trip, since it is undisputed that he told The Port Authority of New York and New Jersey (the "Port Authority") Police Officer Scott Erickson that he had stayed with his firearm and ammunition at an airport hotel. At the time of his arrest, Revell was in possession of a handgun for which he had no permit as required by N.J.S.A. § 26:39(b) and for possession of hollow-point bullets in violation of N.J.S.A. § 2C:39-3 (f).

The Third Circuit's ruling does not implicate Revell's Second Amendment rights because there is no claim that the New Jersey's gun laws being enforced were unconstitutionally restrictive or that the Third Circuit imposed conditions on Revell that were not expressly stated in the statute.

The claim for violation of Revell's due process rights based on the retention of his firearm and ammunition after the charges against him were dropped was also properly dismissed, since New Jersey provided adequate post-deprivation remedies, which he failed to use.

POINT I

THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF REVELL'S CLAIMS BASED ON 18 U.S.C. § 926A AND THE FOURTH AMENDMENT SINCE ON THE PLEADINGS AND UNDISPUTED FACTS HE DID NOT FALL WITHIN THE PROTECTION PROVIDED BY THAT STATUTE

A) Procedural History

The district court dismissed Revell's first complaint based solely on 18 U.S.C. § 926A pursuant to F.R. Civ. P. 12(b)(6), but allowed him to replead under the Fourth Amendment and the Fourteenth Amendment (App. 49a–70a). Revell served an amended complaint alleging a violation of his Fourth Amendment right to be free from unlawful arrest and imprisonment and a violation of his due process right based on the retention of his property by police after the dismissal of the criminal action

against him on August 2, 2005. At the conclusion of discovery, the district court granted summary judgment dismissing the complaint on the ground that there was no violation of his Fourth Amendment right since there was probable cause for his arrest, and on the ground that there was no due process violation because there were adequate post-deprivation remedies (App. 26a-48a). The Third Circuit affirmed the decision of the district court on different grounds with respect to 18 U.S.C. § 926A, since the Third Circuit determined that Revell did not fall within the protection of this statute (App. 3a-25a).

B) The Standard of Review

This Court has held that on a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6), the pleadings must contain " 'something more . . . than a statement of facts that merely creates a suspicion [of] a legally cognizable right of action' ". *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 at 555 *citing* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) ("Wright v. Miller"). In *Twombly*, *supra*, this Court recognized that when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558 *citing* 5 Wright & Miller § 1216 at 233-234.

At the summary judgment stage, this Court has held that the judge's function is not to weigh the evidence to determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v.*

Liberty Lobby, 477 U.S. 242 (1986). As this Court stated in *Anderson*: "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a jury could reasonably find for a plaintiff." *Id.* at 252. "[A] party opposing a properly supported motion for summary may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." *Id.* at 256.

C) Dismissal of Revell's Claim Based On 18 U.S.C. § 926A Was Proper Since The Complaint Stated Facts Which Took Revell Outside The Protection of 18 U.S.C. § 926A

The federal statute involved here, 18 U.S.C. § 926A, which was enacted in 1986 as part of the FOPA to enable individuals to transport firearms through a state even if possession in that state would otherwise be illegal, provides in relevant part:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person ... shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm, if during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, that

> in the case of a vehicle without a compartment separate from the driver's compartment the firearm and ammunition shall be contained in a locked container other than the glove compartment or console.

As the district court's comprehensive review of the legislative history of this bill discloses, the debate in the U.S. Senate focused on the right of law-abiding citizens to travel interstate with their firearms as long as they were not accessible. During the debate, Senator Jim McClure discussed the need for law abiding individuals to travel interstate with their firearms:

> I believe that the Second Amendment means exactly what it says. I believe that our forefathers intended for all honest citizens to be able to arm themselves. This is not a privilege meted out by the Government - it is a sovereign right, belonging to the people themselves.... Under present law, there is no legal way for a person to transport firearms through some States. For example, a hunter from South Carolina has no way of getting through the State of New York to go moose hunting in Maine. The Firearm Owners Protection Act would allow an individual to transport a firearm through the State if the firearm *is unloaded and not easily accessible.* The possession of the firearm must be legal both in the State of residence and in the State of final destination.... This right of transportation does not hinder a State from enacting laws concerning intrastate

> transportation.... Each year thousands of law abiding citizens travel on interstate trips with firearms for hunting purposes, competitions, matches, moving residences, and personal protection upon arrival. There must be some way for law-abiding Americans to exercise the right to interstate travel with personally owned firearms.

132 Cong. Rec. S5358-04 (daily ed. May 6, 1986) (emphasis added) (App. 59a)

Thus, the language in this statute which conditions the lawful transportation of a firearm on its being "unloaded", and on its being not "readily accessible" to the person transporting it.

Here, Revell alleged in his complaint that due to mistakes by the airline consisting of a missed flight connection from Newark, New Jersey to Allentown, Pennsylvania[1] and the failure to check his luggage through to Allentown, he spent the night at an airport hotel. It is undisputed that Revell alleged in the complaint that at Newark Liberty International Airport ("Newark"), he took possession of the two locked containers carrying his firearm and ammunition and

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1. There is nothing on the record here that supports petitioner's assertion that he could lawfully possess his firearm in the State of Pennsylvania. Revell testified at his deposition that he did not check Pennsylvania law to ascertain whether he could carry a weapon there, and he only assumed he could because the instructor for his concealed firearms permit in Utah did not say he could not take the firearm to Pennsylvania (App. 6a n3).

transported them to a hotel at the airport where he spent the night (App. 17a). Revell further alleged that he returned to the airport the next day with the locked containers and that after his luggage passed through the TSA's x-ray screening, he gave the key to both containers to the TSA agent who opened the cases (App. 17a). The TSA agent then notified the Port Authority police and Police Officer Erickson responded. After questioning Revell, Police Officer Erickson arrested him for possession of a handgun without a permit in violation of N. J. Stat. Ann. § 2C:39-5(b)[2] and for possession of hollow-point ammunition in violation of N.J. Stat. Ann. § 2C:39-5(b).[3]

This Court has long held that statutes should be construed according to their plain meaning and to effectuate the intent of the legislature. *U.S., et al. v. American Trucking Ass'ns.*, 310 U.S. 534, 542-543 (1940); *Ardestanti v. I.N.S.*, 502 U.S. 129, 135 (1991). Petitioner's contention that the Third Circuit has misconstrued the terms "readily accessible" because his firearm and ammunition were locked in containers inside his luggage ignores the plain meaning of that language and the legislative purpose as articulated by Senator McClure. Once Revell was in the hotel room with his luggage, it defies reason to argue that he did

2. Section 2C:39-5(b) provides that "[a]ny person who knowingly has in his possession any handgun . . . without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime" of the second or third degree depending on the nature of the handgun (App. 7a n4).

3. Section 2C:39-3(f) provides that "[a]ny person . . . who knowingly has in his possession any hollow nose or dum-dum bullet, . . . is guilty of a crime in the fourth degree.

not have ready access to the firearm and ammunition as he had the key to open the containers (App. 17a). Moreover, it is immaterial that Revell had the containers in his luggage, since he was spending the night at the hotel and it stands to reason that he opened his luggage to change clothes. The fact that he alleges that he did not open the locked containers is irrelevant to the question of whether they were readily accessible. The gun and the ammunition were readily accessible if Revell had the key and the locked containers with him at the hotel so that within seconds he could open the containers and load the firearm. The petitioner's reliance on *Thornton v. United States*, 541 U.S. 615 (2004) is misplaced since that case involves a firearm recovered during the search of an automobile which was incident to an arrest for possession of drugs that took place after the arrestee had exited his vehicle. In *Thornton*, this Court held that the Fourth Amendment did not require an officer to risk the suspects' accessing the vehicle to obtain a weapon or to destroy evidence merely because the critical contact had taken place outside the vehicle. *State v. Williams*, 636 P.2d 1092 (Utah 1981), which is also cited by petitioner is equally inapposite, as that case involved the appeal of a conviction for violating Utah's state statute prohibiting carrying a concealed weapon. In *State v. Williams, supra*, the Supreme Court of Utah affirmed the conviction for carrying a concealed weapon based on the fact that the defendant had a loaded handgun in a satchel on the passenger's front seat of his car. Nor is the Florida Statute § 790.001 (16) applicable here as petitioner argues, since that is a criminal statute where the defined term is "readily accessible for immediate use" as distinguished from merely "readily accessible" as used in FOPA.

As the Third Circuit recognized 18 U.S.C. § 926A "clearly requires a traveler to part ways with his weapon and ammunition during travel; it does not address this type of interrupted journey or what the traveler is to do in this situation." (App. 20a). The Third Circuit suggested that owners in Revell's situation go to law enforcement officials at the airport or airport personnel before retrieving their luggage and ask them to take custody of the firearm and ammunition until he can resume travel. Petitioner's rejection of this proposed solution on the ground that it might be a waiver of his Fifth Amendment rights is unfounded since air travelers with firearms in their check-in luggage are required under Transportation Security Administration ("TSA") regulation in any event to declare it to the airline personnel pursuant to 49 C.F.R. 1540.111(C)(2)[4]. Further, petitioner's contention that law enforcement would be forbidden from returning the firearm is based on a

4. 49 C.F.R. 1540.111 (C)(2) provides as follows:

> (i) The passenger declares to the aircraft operator, either orally or in writing before checking the baggage that any firearm carried in the baggage is unloaded;
>
> (ii) The firearm is carried in a hard-sided container;
>
> (iii) The container in which it is carried is locked, and only the individual checking the baggage retains the key or combination; and
>
> (iv) The checked baggage containing the firearm is carried in an area that is inaccessible to passengers, and is not carried in the flightcrew compartment.

misreading of N.J. Stat. Ann. § 2C:39-12[5] which provides for voluntary surrender of firearms and other prohibited items by residents for the purpose of avoiding prosecution for unlawful possession. Section 2C:58-3,[6] which petitioner also cites as prohibiting airport police from returning Revell's firearm and ammunition after taking custody of them addresses the purchase of firearms in New Jersey not the surrendering temporary custody. There is nothing in New Jersey's laws which would have prevented Revell from surrendering custody of his firearm on a temporary basis to the Port Authority Police or the TASA to remedy his predicament.

D) The Third Circuit Correctly Affirmed The Granting of Summary Judgment Dismissing The Claim For Violation Of Revell's Fourth Amendment Rights On The Ground That There Was Probable Cause For His Arrest

It is well settled that a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe a criminal

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5. N.J. State Ann. 2C:39-12 titled Voluntary Surrender provides in relevant part "[N]o person shall be convicted of an offense under this chapter for possessing any firearms, weapons . . . if after giving written notice of his intention to do so, including the proposed date and time of surrender, he voluntarily surrendered the weapon . . . to the chief of police in the municipality in which he resides."

6. N.J. State Ann. 2C:58-3, titled Purchase of Firearms provides in relevant part that [N]o person shall sell, give, transfer, assign or otherwise dispose of, nor receive, purchase or otherwise acquire a handgun unless the purchaser . . . has first secured a permit.

offense has been or is being committed. *See United States v. Watson*, 423 U.S. 411, 417-424 (1976), *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), Whether probable cause exists depends upon the reasonable conclusions to be drawn from the facts known to the arresting officer at the time of the arrest. *Maryland v. Pringle*, 540 U.S. 366 (2003).

Revell testified at his own deposition that upon missing his connecting flight to Allentown, he retrieved his luggage and took it to a nearby hotel (App. 18b). When he returned to Newark Airport the next day with his luggage containing the firearm and ammunition, they were revealed on the x-ray scanner to the TASA agent who summoned the Port Authority police. Police Officer Scott Erickson, who responded to the scene, testified that Revell acknowledged that he "had the firearm with him when he left for Newark, [and] that he had packed up the bag and taken it with him" (App. 18a). Police Officer Erickson was told by Revell that he had taken the bag with the firearm and ammunition to his hotel.[7] It was therefore undisputed that Revell had access to

7. The Third Circuit specifically noted that Erickson testified as follows:

> Q. He told you that he picked up the bag at Newark because he missed his flight, and went out of the airport,
>
> correct?
>
> A. Yes.
>
> Q. And did he tell you that he went to a hotel that night?
>
> A. Yes. (App. 18a)

his firearm and ammunition in a New Jersey hotel where he stayed for the night and that he communicated this fact to Police Officer Erickson before his arrest. Moreover, Police Officer Erickson observed Revell in possession of the firearm without New Jersey permit and hollow-point ammunition in violation of New Jersey Law. Since Revell was not within the protection afforded by § 926A[8] because his firearm and ammunition were readily accessible during his overnight stay at the hotel, Officer Erickson had probable cause to arrest him for unlawful possession of a firearm and hollow-point ammunition.

E) There Is No Substantial Question Presented For This Court As The Third Circuit's Ruling Does Not Impair Revell's Second Amendment Rights.

This Court in *McDonald v. Chicago, et al.*, No 08-1521 (June 28, 2010) held the Second Amendment applied to the states through the due process clause of the Fourteenth Amendment, and struck down a Chicago law banning handguns in the home. Petitioner's

8. The Third Circuit did not consider the question of whether 18 U.S.C. § 926 A gives rise to a right of action under 42 U.S.C. § 1983, and affirmed the district court's dismissal of this claim on the pleadings on the ground that Revell did not fall within the protection of § 926 A. While the district court ruled that § 926 A did not give rise to a cause of action because this Court ruled in *Graham v. Connor*, 490 U.S. 386 (1989) that all unlawful seizure claims must be brought pursuant to the Fourth Amendment, The Second Circuit in *Torraco v. The Port Authority of New York and New Jersey*, 615 F.3d 129 (2d Cir. 2010) held that § 926 A did not create a separate right because of the enormous practical problems it imposed on police officers in determining compliance.

contention that the Third Circuit's ruling infringes on Revell's Second Amendent rights is unfounded. Revell ran afoul of a New Jersey law, which with some exceptions, requires a person in possession of a gun to have a permit. He could only avoid prosecution under this law by complying with 18 U.S.C. § 926 A. Section 926A offers protection to the interstate traveler with a firearm who is passing through a state with restricted gun laws, but its protection is contingent upon compliance with the requirement that the firearm be kept so that it was not readily accessible. Revell failed to adhere to the conditions set forth in the statute, and thus is not entitled to maintain this action.

Moreover, Revell did not raise a Second Amendment issue below and should be precluded from raising it at this time. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

Lastly, there is no substantial question for this Court because, as petitioner concedes, there is no conflict between the circuits with respect to the meaning of 18 U.S.C. § 926 A.

POINT II

THE SEIZURE AND RETENTION OF REVELL'S PROPERTY DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

It is well settled that law enforcement officers may seize property and specifically weapons incident to a lawful arrest without violating the Fourteenth Amendment's prohibition against depriving a person of property without due process of law. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Harris v. U.S.* 331 U.S. 145 (1947). The seizure of Revell's firearm and ammunition by the Port Authority police was lawful since as discussed *infra*, there was probable cause for his arrest.

A procedural due process claim is analyzed under a two-part inquiry: the court must determine whether *Revell* "was deprived of a protected interest, and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 at 428 (1982). The second prong bars a suit under 42 U.S.C. § 1983 if the deprivation was not caused by conduct pursuant to established state procedure and if there was an adequate available post-deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984).

Revell's due process claim, which is based on the retention of his firearm and weapon by Essex County for a period after the charges against him were dismissed, is deficient in that he failed to show:: 1) that there was an established procedure to retain property

under these circumstances; and 2) that the post-deprivation remedy was inadequate. Revell's reliance on the allegation in his First Amended Complaint that the Port Authority and Police Officer Erickson deprived him of property without due process "pursuant to an established policy" is misplaced (Petitioner's brief p. 26). The seizure of his property was lawful because it was pursuant to a valid arrest. Moreover, on summary judgment, Revell was required to identify a Port Authority policy or procedure that effectively prevented him from recovering his property, which he failed to do. Further, Revell was unable to show that the process provided by the state for recovering his property was not constitutionally adequate. *See Zinermon v. Burch*, 494 U.S. 113, 126 (1990) ("it is necessary to ask what process the state provided and whether it was constitutionally adequate"). Here, as the Third Circuit observed, Revell "failed to explain why New Jersey's state procedures to recover wrongfully seized property, such as the ability to move in the criminal actions for return of his property or the ability to file a separate action for a writ of replevin are insufficient" *citing State v. One 1986 Subaru*, 576 A.2d 859 (N.J. 1990) (the New Jersey Supreme Court held that since the owner of a property seized as evidence in a criminal proceeding can file a replevin or move to retrieve the property, his inaction weighs against a claim that his due process rights were violated) (App. 23a-24a). Nor, as the Third Circuit found, was Revell entitled to any special notice of these legal remedies. *See City of W. Covina v. Perkins*, 525 U.S. 234 (1999) (App. 24a). In *Covina*, this Court held that the due process clause does not "require [ ] a state or its local entities to give detailed and specific instructions or advice to owners who seek return of

property lawfully seized but no longer needed for police investigation or criminal prosecution." *Id.* at 236 (App. 24a).

Moreover, as the District Court pointed out, Revell ultimately recovered his property through the simple means of requesting its release from Essex County (App. 45a). Accordingly, there is no conflict between the Third Circuit's ruling in this case and the Court of Appeals for the District of Columbia's holding in *Ford v. Turner*, 531 A.2d 233 (D.C. 1987) because in that case, the plaintiff and her attorney had sent written requests to the Property Clerk to recover guns taken from her deceased sister's apartment which were not evidence in her sister's death but merely unregistered firearms to which she was entitled as administratrix. In *Ford*, the property clerk never notified plaintiff of the legal basis for the forfeiture or the continued retention of the guns. Even assuming *Ford*, *supra*, is good law in light of this Court's decision in *City of W. Covina v. Perkins*, *supra*, it is readily distinguishable from the instant case on the facts because Revell had no trouble recovering his property when he requested it.

CONCLUSION

This Court Should Deny This Petition For A Writ Of Certiorari To Review The Judgment Of The United States Court of Appeals For the Third Circuit.

Respectfully submitted,

KATHLEEN GILL MILLER
Counsel of Record
OFFICE OF JAMES M. BEGLEY
THE PORT AUTHORITY OF NY & NJ
225 Park Avenue South
13th Floor
New York, NY 10003
(212) 435-3434
kmiller@panynj.gov

Attorney for Respondents